TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 553.

LARS THOMPSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED DECEMBER 28, 1897.

(16,766.)

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a In the Supreme Court of the State of Utah.

THE STATE OF UTAH, Respondent,
v.
LARS THOMPSON, Appellant.

Transcript on Appeal to the Supreme Court of Utah.

Filed July 3rd, 1897.

L. P. PALMER,
Clerk Supreme Court of Utah.

1 In the District Court of the Second Judicial District of the Territory of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH, Plaintiff,
v.
JACK MOORE and LARS THOMPSON, Defendants.
Indictment for Grand Larceny.

Jack Moore and Lars Thompson, the said defendants, are accused by the grand jury of this court by this indictment of the crime of grand larceny, committed as follows: That the said defendants, Jack Moore and Lars Thompson, on the second day of March, eighteen hundred and ninety-five, at Wayne county, Territory of Utah, and within the jurisdiction of this court, one calf, then and there being the property of one Heber Wilson, did unlawfully and feloniously steal, take, and drive away, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the people of the Territory of Utah.

W. T. H. DOTONS,
Foreman of the Grand Jury.

JOHN W. JUDD,
United States District Attorney,
By W. M. McCARTY,
Assistant U. S. District Attorney.

Names of witnesses examined before the grand jury on finding the foregoing indictment: Heber Wilson, Alma Young, John Cattrell, Henry Thompson, J. B. Buhr.

The defendant Jack Moore, at his own request and at *at* the request of Barlow Ferguson, his attorney, came before the grand jury and made a voluntary statement.

2 In the Second Judicial District Court of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH
v.
JACK MOORE and LARS THOMPSON.
Verdict.

We, the jury empanelled in the above-entitled cause, find the defendants, Jack Moore and Lars Thompson, guilty of grand larceny,

as charged in the indictment. We recommend the defendants to the mercy of the court.

Nov. 21, 1895.

W. S. BRINKERHOFF, *Foreman.*

3 In the Second Judicial District Court of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH }
v.
JACK MOORE and LARS THOMPSON. }

Come counsel for the people, and the said defendants with their counsel. Thereupon the motion for a new trial heretofore filed herein is argued and submitted and by the court taken under advisement. Thereupon it is ordered that in the event of a new trial being granted that the said Jack Moore be admitted to bail in the sum of $750, and that the said Lars Thompson in the sum of $500, and in the event said motion for a new trial is overruled, then defendants are likewise to be admitted to bail as aforesaid pending an appeal to the supreme court.

THE PEOPLE OF THE TERRITORY OF UTAH }
v.
JACK MOORE and LARS THOMPSON. }

This cause having heretofore been argued and submitted on motion for a new trial, and the court, being now fully advised, orders that a new trial be granted herein, and it is further ordered, on application, that D. J. Frew be entered as associate counsel herein.

4 In the Fifth Judicial District Court of the State of Utah, Beaver County, February 28th, of the February Term, A. D. 1896.

Present: E. V. Higgins, judge.

In the Matter of the Transfer of the Files of the District Court Cases Now in the Custody of the District Clerk of Beaver County.

The clerk of the district court of Beaver county, Utah, is hereby authorized and directed to forthwith transfer the files of all civil and criminal causes to the several county clerks where said causes are properly triable.

5 In the District Court of the Sixth Judicial District, County of Wayne, State of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH }
v.
JACK MOORE and LARS THOMPSON. }

Order Changing Place of Trial.

Now, on this 26th day of April, 1897, the same being the regular April term of this court, sitting in the county of Wayne, State of

Utah, came the defendants, Jack Moore and Lars Thompson, and move the court for a change of the place of trial herein to some county outside of this judicial district, because the presiding judge of this district is disqualified to try the same by reason of the fact he was at the time the indictment was presented and filed herein the prosecuting attorney, who prepared the said indictment, as appears by the said indictment on file herein, and the county and prosecuting attorney consents thereto, and it appearing to the court that the said grounds are true in fact, that the law is in favor of said motion, and that the county and prosecuting attorney for this county and the said defendants all consent to the said change of trial and the making of said order—

It is therefore hereby ordered, adjudged, and decreed by the court that the said motion be, and it is hereby, granted; that the place of trial of this cause be, and is hereby, changed from this Wayne county to the county of Emery, in the State of Utah, in the 7th judicial district, to be there tried and finally disposed of, as is by law in such cases made and provided, and the clerk of this court is hereby directed, authorized, and required to forthwith prepare a certified transcript of all the docket entries made herein and forward the same at once to the clerk of the district court within and for the said county of Emery, in the State of Utah and said district, together with all the files and papers herein.

Dated this April 26, 1897.

W. M. McCARTY, *Judge.*

6 In the Seventh Judicial District Court, County of Emery, State of Utah.

THE STATE OF UTAH
v.
LARS THOMPSON, Defendant. } Verdict.

We, the jury empanneled in the above-entitled cause, find said defendant, Lars Thompson, guilty as charged in the indictment.

H. H. OVIATT, *Foreman.*

Dated Castle Dale, Utah, May 26, 1897.

7 In the District Court of the Seventh Judicial District of the State of Utah in and for the County of Emery.

THE PEOPLE OF THE TERRITORY OF UTAH,
Plaintiff,
v.
JACK MOORE and LARS THOMPSON, Defendants. } Motion for a New Trial for Lars Thompson.

Comes now the defendant Lars Thompson and moves the court to vacate and set aside the verdict of the jury and to grant a new trial of this cause, upon the following grounds, to wit:

1.

Errors of law occurring at the trial and excepted to by the defendant.

2.

The evidence is insufficient to justify the verdict.

3.

That the defendant has not had a trial by a jury, as provided by law, and more particularly because—

First. At the time the alleged offense is charged to have been committed a lawful jury was composed of twelve jurors and no less number.

Second. That the time the indictment was found and returned by the grand jury a trial jury was composed, by law, of twelve jurors and no less number.

Third. The pretended jury by which the defendant was tried, on the 26th day of May, 1897, consisted of eight persons or jurors and no more.

J. W. N. WHITECOTTON,
Attorney for Defendant Lars Thompson.

Overruling Motion.

Said motion was overruled by the court; to which ruling the defendant duly excepted.

7½

THE STATE OF UTAH
v.
LARS THOMPSON.

In this cause J. W. N. Whitecotten, Esq., moves the court to vacate and set aside the verdict of the jury and grant a new trial upon the following grounds, to wit:

1. Errors of law occurring at the trial and excepted to by the defendant.

2. That the defendant has not had a trial by a jury at all, as provided by law.

Said motion was overruled by the court; to which ruling the defendant duly excepted.

STATE OF UTAH,
County of Emery, } ss:

—, O. J. Sitterud, county clerk in and for the county of Emery State of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the original order overruling the motion for a new trial in the above-entitled cause on the 27th day of May, A. D. 1897, as appears of record in my office, in Castle Dale, Utah.

In witness whereof I have hereunto set my hand and affixed my official seal this 29th day of June, A. D. 1897.

O. J. SITTERUD,
[SEAL.] *County Clerk and ex Officio Clerk 7th Jud. Dist. Court of Utah in and for Emery County.*

8 At a stated term of the district court for the seventh judicial district of the State of Utah, held at the court-room of said court, at Castle Dale, in and for Emery county and State of Utah, on the 27th day of May, A. D. 1897.

Present: The Hon. Jacob Johnson, judge.

THE STATE OF UTAH
v.
LARS THOMPSON. } Judgment on Conviction for Grand Larceny.

Defendant being present in court and ready for sentence, thereupon the court renders its judgment:

That whereas the said defendant, Lars Thompson, having been convicted in this court of the crime of grand larceny, it is therefore ordered, adjudged, and decreed that the said Lars Thompson be imprisoned in the State prison of the State of Utah for the term of three years.

You, said defendant, Lars Thompson, are rendered into the custody of the sheriff of Emery county, State of Utah, to be by him delivered into the custody of the warden or other proper officer of said State prison.

JACOB JOHNSON, *Judge.*

9 In the District Court of the Seventh Judicial District of the State of Utah in and for the County of Emery.

THE PEOPLE OF THE TERRITORY OF UTAH,
Plaintiff,
v.
JACK MOORE and LARS THOMPSON, Defendants. } Bill of Exceptions.

This cause was commenced in the second district court of the Territory of Utah by an indictment returned by the grand jury of that district in the month of May, 1895, charging the defendants with grand larceny by stealing a certain calf, the property of Heber Wilson, in Wayne county, on the second day of March 1895.

Upon this indictment a trial was had at Beaver city, in said district court, in the month of November, 1895, by a jury of twelve men, and the defendants were both found guilty, and the court subsequently set aside the verdict of the jury and granted a new trial.

The case on the incoming of statehood was duly transferred from the second district court of the Territory to the sixth district court of the State for Wayne county, and in the month of April, 1897, a change of venue was granted on defendants' motion to the seventh district court for Emery county.

10 On the 26th day of May, 1897, the State appearing by Messrs. Samuel A. King, Bean, Rapp and Eckersley, and the defendant Lars Thompson appearing by his counsel, W. K. Reid and J. W. N. Whitecotton, the defendant Lars Thompson was tried

in the said seventh district court, Hon. Jacob Johnson, district judge, presiding, by a jury consisting of eight jurors only, and the said eight jurors returned a verdict of guilty of grand larceny against him as charged in the indictment.

On the 27th day of May, 1897, the said defendant, Lars Thompson, being called for sentence, by his counsel moved the court to set aside and vacate the verdict and grant a new trial of said cause, on the ground, among others, that the defendant had not had a trial of his case by a jury as provided by law, and more particularly because:

1. At the time the alleged offense is charged to have been committed a lawful jury was composed of twelve jurors and no less number.

2. That at the time the indictment was found and returned by the grand jury a trial jury was composed by law of twelve jurors and no less number.

3. The jury by which the defendant was tried on the 26th day of May, 1897, consisted of eight persons or jurors and no more.

Which said motion was by the court overruled; to which the defendant Lars Thompson duly excepted. The court thereupon passed judgment upon the defendant that he be imprisoned in the State prison of the State of Utah for the period of three years; to which the defendant duly excepted.

The foregoing is defendant Lars Thompson's proposed bill of exceptions to be used on the appeal of said cause to the supreme court of the State of Utah.

J. W. N. WHITECOTTON,
Attorney for Lars Thompson.

It is now hereby agreed that the foregoing bill of exceptions is correct and the same may be settled and allowed.

SAMUEL A. KING,
11 *Of Counsel for the State.*

June 2nd, 1897.

The foregoing bill of exceptions, being correct, is hereby settled and allowed.

June 4th, 1897.

JACOB JOHNSON,
District Judge.

Title of Court and Cause.

To the State of Utah and to Messrs. Samuel A. King, Eckersley, Bean and Rapp, attorneys for the State, and O. J. Sitterud, clerk of the seventh district court of Utah in and for Emery county:

You will take notice that the defendant Lars Thompson hereby appeals to the supreme court of the State of Utah from the order of the trial court overruling defendant's motion for a new trial, and

from the judgment of said court in passing and imposing upon the defendant that he be confined in the State prison of the State of Utah for the period of three years.

J. W. N. WHITECOTTON,
Attorney for Defendant, Lars Thompson.

12 STATE OF UTAH, } ss:
County of Emery, }

I, the undersigned, do hereby certify that the foregoing are true and correct copies of original papers, indictment, verdict of first jury, order of court granting new trial, order of court transferring case to Wayne county, order of court granting change of venue to Emery county, verdict of jury in last trial, motion for new trial, order of court overruling motion, judgment, bill of exceptions, and notice of appeal in the case "The People, etc., *v.* Jack Moore and Lars Thompson" as they appear on file at my office, in Castle Dale, Utah.

In witness whereof I have hereunto set my hand and seal this 15th day of June, A. D. 1897.

[SEAL.] O. J. SITTERUD,
County Clerk and ex Officio District Clerk of the Seventh District Court of Utah in and for Emery County.

Endorsed: In the district court, seventh judicial district, State of Utah, county of Emery. The State *v.* Lars Thompson.

Endorsed: In the supreme court of the State of Utah. Lars Thompson, appellant, *v.* The State of Utah, respondent. Filed July 3rd, 1897. L. P. Palmer, clerk supreme court of Utah.

13 In the Supreme Court of the State of Utah. Regular September Term, September 13, 1897.

STATE OF UTAH, Respondent, }
v. } Submission.
LARS THOMPSON, Appellant. }

This cause, coming on regularly for hearing, was argued by J. W. N. Whitecotton, Esq., in behalf of the appellant; by Benner X. Smith, ass't att'y general, in reply, was submitted, and by the court taken under advisement (Bartch, J., sitting by request).

SEPTEMBER 27TH, 1897.

Title of Court and Cause.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the lower court be, and the same is hereby, affirmed.

14 In the Supreme Court of the State of Utah.

THE STATE OF UTAH, Respondent,
v.
LARS THOMPSON, Appellant.

MINER, *J.*:

The appellant Thompson was indicted for the crime of grand larceny in May, 1895. He was tried in Emery county in May, 1897, before a jury consisting of eight persons duly chosen and qualified, found guilty and sentenced to imprisonment in the penitentiary. When called upon for sentence his counsel moved to vacate and set aside the verdict on the ground that the defendant had been tried before eight jurors, when the law in force at the time of the alleged commission of the offense provided that the defendant should be tried by twelve jurors; that the alleged conviction was in violation of the provisions of the Constitution of the United States guaranteeing due process of law, and that the constitution and laws of Utah providing for trials in criminal cases, not capital, by a jury of eight persons were, as to the offense committed prior to the admission of the State into the Union, in violation of sec. 10, article 1, of the Constitution of the United States.

15 The motion was overruled and the defendant appealed to this court.

The questions involved in this appeal were fully passed upon by the court in the case of The State *v.* Bates, 47 Pac. Rep., 78, — 14 Utah, —. That case is decisive of this.

We find no error in the record. The judgment of the district court is affirmed.

We concur:
ZANE, *C. J.*
BARTCH, *J.*

Endorsed: State of Utah *v.* Lars Thompson. Opinion. Filed September 27, 1897. Lilburn P. Palmer, clerk supreme court, Utah.

16 In the Supreme Court of the United States.

LARS THOMPSON, Plaintiff in Error,
vs.
THE STATE OF UTAH, Defendant in Error.
Petition for Writ of Error.

Comes now Lars Thompson, the plaintiff herein, and respectfully shows to the court:

I. That in the month of May, 1895, in the second judicial district court of the Territory of Utah, he, in connection with one Jack Moore, was indicted by the grand jury of said court for the crime of grand larceny, in said indictment alleged to have been

committed in Wayne county, within said judicial district, in the month of March, 1895.

II. That he was thereafter, to wit, in the month of November, 1895, duly tried in said court by a jury composed of twelve persons and convicted of grand larceny, as charged in said indictment, and upon his motion therefor the verdict of the jury was set aside and a new trial ordered.

III. That in the month of May, 1897, he was again tried in the district court of the seventh judicial district in and for Emery county on a change of venue upon the same indictment by a jury composed of eight persons only, and by said jury convicted of the crime of grand larceny, and on the 26th day of said month of May, 1897, being called for sentence, thereupon moved the court to vacate and set aside the verdict of the jury in his case and to grant a new trial thereof on the following grounds, to wit, that he, the defendant, had not had a trial of his case by a jury as provided by
17 law, and more particularly because:

1. At the time the alleged offense is charged to have been committed a lawful jury was composed of twelve jurors and no less number.

2. That at the time the indictment was found and returned by the grand jury a trial jury was composed by law of twelve jurors and no less number.

3. The jury by which the defendant was tried on the 26th day of May, 1897, consisted of eight jurors and no more.

Which motion was overruled by the court; to which the defendant duly excepted.

IV. That the court thereupon passed judgment upon defendant, plaintiff herein, that he be imprisoned in the State prison of the State of Utah for a period of three years; to which defendant duly excepted.

V. That from said judgment of said district court the plaintiff herein appealed to the supreme court of the State of Utah, and the said supreme court on the 27th day of September, 1897, rendered its judgment on said appeal, affirming the judgment of the trial court.

In the supreme court of the State of Utah the appellant there, plaintiff herein, claimed that the judgment against him was illegal because section ten of article one — the constitution of the State of Utah, limiting a jury to eight persons in the trial of causes of felony arising before Utah became a State, and especially as to his case, is *ex post facto* and void and in contravention of subdivision one, section X, of article I of the Constitution of the United States, and in contravention also of section one of article XIV of the amendments to the Constitution of the United States, which prohibits a State from depriving any person of life, liberty, or property
18 without due process of law, and in his appeal to the supreme court made no other contention.

VI. The said supreme court, in deciding said cause, expressly held that said constitution of the State of Utah and the laws passed thereunder were valid and not in contravention of the Constitution

of the United States, as claimed by appellant there, plaintiff herein, and passed upon no other question.

In this judgment of the supreme court of the State of Utah this plaintiff is by his counsel advised and verily believes, and therefore states, that error was committed to his great detriment and injury, which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays—

That a writ of error may issue in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated November 24th, 1897.

LARS THOMPSON,
By J. W. N. WHITECOTTON,
His Attorney.

Attorney's address: Provo, Utah.

Filed Nov. 24, 1897.

LILBURN P. PALMER,
Clerk Supreme Court, Utah.

19 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law of the said State in which a decision could be had in the said cause between The State of Utah and Lars Thompson, wherein was drawn in question the validity of the constitution and laws of the State of Utah and an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Lars Thompson, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-third day of January, 1898, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of November, 1897.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District Utah.

Allowed by—
CHARLES S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

Filed Nov. 24, 1897.

LILBURN P. PALMER,
Clerk Supreme Court, Utah.

20 In the Supreme Court of the United States.

In the Matter of the Petition of LARS THOMPSON for a Writ of Error to the Supreme Court of the State of Utah.

Assignment of Errors.

Comes now Lars Thompson, petitioner for a writ of error to the supreme court of the State of Utah, by J. W. N. Whitecotton, his attorney, and says that the said supreme court of the State of Utah in rendering its decision and judgment in this cause erred in the following particulars, to wit:

1. The said court erred in upholding the validity of section ten of article one of the constitution and laws of the State of Utah, providing that a jury for the trial of felonies alleged to have been committed while Utah was a Territory and before said State constitution and laws had any existence should be composed of eight persons only in cases not capital.

2. The said court erred in deciding that said State constitution and laws are not *ex post facto* and not in contravention of subdivision one of section ten of article one of the Constitution of the United States with reference to offenses committed while Utah was a Territory, and a trial jury consisted of twelve men and no less number.

3. The said supreme court erred in deciding that the judgment against the plaintiff herein was by due process of law.

4. The said supreme court erred in affirming the judgment of the district court in said cause for each and all the reasons above
21 set forth, and for the further reason that the plaintiff herein has never been tried by a jury at all.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

22 UNITED STATES OF AMERICA, *ss:*

To the State of Utah, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty

days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, wherein Lars Thompson is plaintiff in error and The State of Utah is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of the State of Utah, this 24th day of November, 1897.

(Signed) CHARLES S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

Received a copy of the above this 26th day of November, 1897.

A. C. BISHOP,
Attorney General.

Filed Nov. 24, 1897.

LILBURN P. PALMER,
Clerk Supreme Court Utah.

23 UNITED STATES OF AMERICA:

STATE OF UTAH, } ss:
County of Salt Lake, }

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, in pursuance of the attached writ of error, allowed in the case wherein Lars Thompson is plaintiff in error and The State of Utah is defendant in error, do return attached hereto a transcript of the record and proceedings and copy of opinion, together with the original citation, writ, and assignment of errors, all in and of said court and cause; and I hereby certify that said attached transcript of said record and proceedings and opinion are full, true, and correct copies of the several originals thereof on file or of record in my office.

Seal Supreme Court, State of Utah, Jan. 4, 1896.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of the State of Utah this 29th day of November, 1897.

L. P. PALMER,
Clerk Supreme Court of Utah,
By H. W. GRIFFITH,
Deputy Clerk.

Endorsed on cover: Case No. 16,766. Utah supreme court. Term No., 553. Lars Thompson, plaintiff in error, *vs.* The State of Utah. Filed December 28th, 1897.

No. 553.

Motion to advance.

Filed Jan. 21, 1898.

OFFICE SUPREME COURT, U. S.
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

LARS THOMPSON,
Plaintiff in Error.

vs.

THE STATE OF UTAH,
Defendant in Error.

Case No. 553. October Term, 1897.

Motion to Advance.

Comes now the plaintiff in error in the above-entitled cause, by his counsel appearing in that behalf, and moves the Court to advance said cause to as speedy a hearing as will be convenient for the Court, and for grounds of this motion states as follows:

In this cause the plaintiff asks by his writ of error that this Court review the judgment of the Supreme Court of the State of Utah by which it affirmed a judgment of the trial Court, that the plaintiff be confined in the State Prison of the State of Utah for a term of three years, on a conviction of the crime of grand larceny.

The record shows that the crime of which the plaintiff here was convicted was committed in March, 1895, while Utah

was a Territory, and a lawful trial jury consisted of twelve persons and no less number. That plaintiff was tried in May, 1897, by a jury of only eight men and convicted, and upon this conviction said judgment was pronounced. Plaintiff claims, that as to offences committed under Territorial government, and particularly as to his offence, the Constitution and laws of the State of Utah, reducing the number of a trial jury, is *ex-post facto*, and void under Section 10, Article I, of the Constitution of the United States. The Supreme Court of the State of Utah upheld the validity of the State Constitution and law, and the plaintiff brings his writ of error, and meanwhile is serving his sentence in the Penitentiary, bail having been by the State Supreme Court denied him pending the determination of the matter in this Court.

The reason for this application to advance is: That plaintiff is in the State Prison of Utah serving his sentence, and is denied bail by the Supreme Court of the State of Utah.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

FILED.
JAN 25 189
JAMES H. McKENNE

No. 553.

Brief of Whitecotton for P. E.

Filed Jan. 25, 1898.

Supreme Court of the United States.

October Term, 1897.

No. 553.

LARS THOMPSON,
Plaintiff in Error.
vs.
THE STATE OF UTAH,

In Error to the Supreme Court of the State of Utah.

Plaintiff's Brief.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

Filed January....., 1898.

J. C. GRAHAM, JR., PRINTER, PROVO.

Supreme Court of the United States.

October Term, 1897.

No. 553.

LARS THOMPSON,
Plaintiff in Error.

vs.

THE STATE OF UTAH.

In Error to the Supreme Court of the State of Utah.

Plaintiff's Brief.

I. STATEMENT OF CASE.

The plaintiff in error and one Jack Moore were indicted in the Second District Court of the Territory of Utah, in the month of May, 1895, and by the indictment charged with the crime of grand larceny, alleged to have been committed in the month of March, 1895, at Wayne County, Territory of Utah. (See indictment, page 1 of Record.)

On the 21st day of November, 1895, the plaintiff and the other defendant were tried by a jury of twelve persons, and convicted as charged in the indictment. (Record, page 1.)

The verdict of the jury was set aside by the trial Court.

(Page 2 of Record.) and when Utah Territory was admitted into the Union as a State, this cause was transferred to Wayne County, and from Wayne County a change of venue was taken to Emery County, where the case was again tried against the defendant Lars Thompson, plaintiff herein, on the 26th day of May, 1897, by a jury consisting of only eight persons, and a verdict of guilty of grand larceny, as charged in the indictment, was returned. (Page 3 of Record.)

The defendant was then called for sentence, and when asked if he had any legal excuse to show, why he should not receive the sentence and judgment of the Court, by his counsel moved the Court to vacate and set aside the verdict of the jury, and to grant a new trial of the cause, for the reason, among other things,

That the defendant had not had a trial by a jury, as provided by law, and more particularly because –

First: At the time the alleged offense is charged to have been committed, a lawful jury was composed of twelve jurors and no less number.

Second: That at the time the indictment was found and returned by the grand jury a trial jury was composed by law of twelve jurors and no less number.

Third: The pretended jury by which the defendant was tried, on May 26th, 1897, consisted of eight persons only. (Pages 3 and 4 of Record.)

This motion was over-ruled by the Court, and judgment pronounced upon him, that he be imprisoned in the State prison of the State of Utah, for the term of three years. (Page 5 of Record.)

On the 4th day of June, 1897, the trial Judge settled a bill of exceptions (Pages 5 and 6 of Record) and thereupon and upon the record in the case, the defendant appealed from the judgment of the trial Court to the Supreme Court of the State of Utah.

In the State Supreme Court the appellant claimed that Section 10 of Article I. of the Constitution of the State of Utah, providing that, except in capital cases, a trial jury shall consist of eight jurors, is, as to offenses committed before statehood in Utah, and particularly as to his offense, *ex post facto*, and void, and in contravention of Section 10, Article I. of the Constitution of the United States.

By a decision rendered in said cause on the 27th day of September, 1897, the State Supreme Court over-ruled said contention, and sustained the validity of the judgment against the appellant there, plaintiff here, and sustained the validity of the said State constitutional provison reducing a trial jury from twelve to eight persons in cases of felony arising under Territorial government.

It is to review this judgment, that this writ of error is brought.

II. ERRORS RELIED ON FOR REVERSAL.

1. The State Supreme Court erred in upholding the validity of *Section 10* of Article I. of the Constitution of the State of Utah, providing that a jury for the trial of felonies alleged to have been committed while Utah was a Territory and before said State Constitution and laws had any existence should be composed of eight persons only in cases not capital.

2. The said Court erred in deciding that said State Constitution and laws are not *ex post facto* and not in contravention of Subdivision 1 of Section 10, of Article I. of the Constitution of the United States, with reference to offenses committed while Utah was a Territory, and a trial jury consisted of twelve jurors and no less number.

3. The said Court erred in deciding that the judgment against the plaintiff herein was by due process of law.

4. The said Court erred in affirming the judgment of the

trial Court in said cause for each and all the reasons above set forth, and for the further reason that the plaintiff has not been tried by a jury at all.

III. POINTS OF LAW.

1. *Section* 3065, II Compiled Laws of Utah, 1888, reads as follows: "A trial jury in a District Court consists of twelve, and in the Justice's Courts of six men, unless the parties to the action or proceeding, in other than criminal cases, agree upon a less number."

Section 4790, II C. L. U., 1888: "No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the Court, or upon a plea of guilty, or upon judgment against him upon a demurrer in the case mentioned in Section 199, or upon a judgment of a Court, a jury having been waived in a criminal action not amounting to a felony."

Section 4997, II C. L. U. 1888: "Issues of fact must be tried by jury, unless a trial by jury be waived in criminal cases not amounting to a felony by the consent of both parties expressed in open Court and entered in its minutes."

Section 4380, II C. L. U., 1888: "A felony is a crime which is, or may be, punishable with death, or by imprisonment in the penitentiary. Every other crime is a misdemeanor."

Section 4643, II C. L. U., 1888: "Grand larceny is larceny committed in either of the following cases: * * * * 3. When the property taken is a horse, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, mule, jack, or jenny."

Section 4644, II C. L. U., 1888: "Grand larceny is punishable by imprisonment in the penitentiary for not less than one nor more than ten years."

All the sections above set forth, so far as they relate to

criminal causes, were in full force and effect until January 6th, 1896, when the State Constitution and government became effective

Under these statutes the plaintiff in error was indicted in May, 1895, and tried in November, 1895, by a jury of twelve men and the verdict was set aside by the Court.

2. Section 10 of Article I, of the Constitution of Utah, reads as follows: "In capital cases the right of trial by jury shall remain inviolate. In Courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. * * * "

Under this provision of the Constitution, there being no legislation thereon, the plaintiff in error was tried by a pretended jury of eight persons, and upon their verdict of guilty he was sentenced to three years in the State prison.

3. By Subdivision 1 of Section 10 of Article I, of the Constitution of the United States, "No state shall * * * pass any * * * *ex post facto* law. * * "

By the sections of the Compiled laws of Utah, 1888, above quoted, all of which were law at the time the offense charged against the plaintiff, was committed, if committed at all, there was no way, by which he could be punished for the act charged, until after a jury of twelve men had unanimously agreed upon a verdict of guilty, unless he should plead guilty.

In cases amounting to felony, the accused was not permitted to waive a jury trial, and in the case of the Territory of Montana vs. Ah Wah, reported in I Pacific Reporter page 732, the Supreme Court of Montana held that the defendant could not waive one juror and consent to be tried by eleven. His consent was held to be a nullity. No valid judgment could be pronounced upon such a verdict. The whole opinion is full of learning upon the subject at bar.

The State Supreme Court of Utah justifies its decision in this case by referring to the case of the State vs. Bates, 14 Utah, 293, where in passing upon the same question, they say at page 301, "If a jury of eight men is as likely to ascertain

the truth as twelve, that number secures the end. There can be no magic in the number twelve, though hallowed by time. Intelligence, impartiality, and integrity, are the qualities that will enable and influence jurors to ascertain and declare the truth. Such result does not depend upon any particular number." Why would not that language apply equally to three men, or to one good man? If four of a jury of twelve can be lawfully taken away, why not eight, or eleven? Surely if the State can take away any part o. the jury as it existed at the time the offense was committed, it can take away any other part, or the whole.

And that would seem to be the logical test of the soundness of the contention of the State. Can it take away the right to a jury trial for an offense, which, under the law in force at the time it was committed, could be punished only upon conviction by the unanimous verdict of a jury of twelve men?

The Supreme Court of Utah says in the opinion above quoted from, that the number of jurors that shall try a man charged with crime is only a matter of *procedure*. A *mere* formal ceremony, a shadow, in which the accused can have no substantial or abiding right, they may as well have said. Judging from this decision alone, one would be beguiled into forgetting that the English speaking people have always been ready to meet their kings on the field of battle to maintain this sacred right as the palladium of their liberties, and the strongest bulwark that has ever stood between the citizen and the arbitrary rule of tyrants.

The *personnel* of the Court, when this decision was rendered, was about the same as when the Supreme Court of the Territory of Utah decided the case of the American Publishing Co. vs. Fisher, which came to this Court on a writ of error to the Territorial Supreme Court. The Territorial Supreme Court held in that case that a verdict by nine jurors out of twelve was valid, but this Court took a different view of the matter, as appears in American Publishing Co. vs. Fisher, 166 U. S. 464,

and other cases decided at the same term. The Utah Court held, in that case, 10 Utah, 147,—that it was mere procedure—not a matter of *substantial* right, but something that could any time be blown away by the breath of a legislature.

The plaintiff in error contends, that he was entitled to be tried by a jury of twelve men, because, at the time the offense is charged to have been committed, he could not be punished without being first convicted by such a jury. It stood before him as a shield, which no power can lawfully take away. If changing the number of a jury were only changing the procedure, and not tampering with substantial rights, it would have been competent for the Territorial Legislature to change it, which it has been repeatedly held by this Court they could not do. The Territorial legislature could not have taken away four of his jury. Why? Because it was a substantial right.

Am. Pub. Co. vs. Fisher, 166 U. S. 464.

Then, for the same reason, the State cannot do it.

McCarty vs. State, 25 Pac. Rep. 299.

Kring vs. Missouri, 107 U. S. 221.

In the latter case, at page 232, Mr. Justice Miller, speaking for the Court, and discussing what is procedure, says: "*Can the law with regard to bail, to indictments, to grand jurors, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offence was committed, and such legislation not held to be ex post facto because it relates to procedure, as it does, according to Mr. Bishop?*

"*And can any substantial right, which the law gave the defendant at the time to which his guilt relates be taken away from him by ex post facto legislation, because in the use of a modern phrase, it is called a law of procedure? We think it cannot.*"

So far as this case is concerned, we do not question the power of the State to fix the number of trial jurors at eight or any other number to try cases arising after the law is fixed.

We object to being tried by a law that was enacted after the commission of the offense, which places us in a less favorable situation, than we were in when the offense was committed.

Medley, Petitioner, 134 U. S. 160.

The plaintiff in error respectfully submits, that the judgment of the Supreme Court of Utah ought to be reversed.

J. W. N. WHITECOTTON,

Attorney for Plaintiff in Error.

ice Supreme Court U. S.
FILED.
MAR 1 1898
JAMES H. McKENNEY,
CLERK

No. 553.

Brief of Dudley & McKenzie for D. E.

Filed Mar. 1, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

LARS THOMPSON,
Plaintiff in Error,
vs.
THE STATE OF UTAH.

No. 553.

Brief for Defendant in Error.

A. C. BISHOP,
Attorney General.

BENNER X. SMITH,
Deputy Attorney General.

F. W. GARDINER CO., PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1897.

LARS THOMPSON,
Plaintiff in Error,
vs.
THE STATE OF UTAH.

No. 553.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

The bill of exceptions contained in the transcript of the record, page 5, discloses that the plaintiff in error was indicted in the year 1895 for a felony committed in Wayne County, Utah, on the 2d day of March, 1895; that the trial was had and the conviction thereon set aside, and in the month of April, 1897, the cause having been transferred to Emery County, upon motion of the plaintiff in error, he was placed upon trial before a jury consisting of eight persons only, who returned a verdict of guilty of grand larceny as charged in the indictment.

The defendant made no objection on the trial to the number of jurors, but, after the conviction, and before judgment, he moved the Court for a new trial, claiming that he

had not had a trial by a jury, as provided by law, in that he was convicted by a verdict of eight jurors, and that he was entitled to be tried by a jury composed of twelve.

The State of Utah was admitted into the Union January 4, 1896. Plaintiff in error appealed to the Supreme Court of Utah, alleging there the same grounds alleged upon his motion for a new trial. The judgment was affirmed upon the authority of the case of State vs. Bates, 14 Utah, 293; 47 Pac. Rep., 78. He thereupon prosecutes his writ of error to this Court, alleging that the jury law of Utah was *ex post facto* as to him, and within the prohibition of the Constitution of the United States.

It will be noticed in the brief for the plaintiff in error that his counsel does not question the power of the State to fix the number of trial jurors at eight, or any other number, to try cases arising after the law is fixed (page 8), and the only contention urged in this Court is that he has been convicted in violation of that provision of the Constitution of the United States providing: "No State shall * * * pass any * * * *ex post facto* law."

In discussing this question it is necessary to refer to the Constitution of the State of Utah, under which the defendant was convicted, which modified the laws of 1888 as to the trial jury, and the definitions and decisions wherein the prohibition of the Constitution of the United States was involved.

Section 10, Article I, of the Constitution of Utah provides: "In capital cases the right of trial by jury shall

remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

Section 26, Article I, provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Section 2, Article XXIV, Schedule: "All the laws of the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature."

Section 6, of the same Article: "All criminal prosecutions and penal actions which may have arisen or which may arise before the change from a Territorial to a State government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the State and in the Court having jurisdiction thereof. All offenses committed against the laws of the Territory of Utah, before the change from a Territorial to a State government, and which shall not have been prosecuted before such change, may be prosecuted in the name and by the authority of the State of Utah with like effect as though such change had not taken place, and all penalties incurred shall remain the same as if this Constitution had not been adopted."

Unless these provisions of the Constitution are within the prohibition of Section 10, Article I, of the Constitution of the United States in reference to *ex post facto* laws, then the decision must be adverse to the contention of the plaintiff in error. The decisions of this Court and of the State Courts, wherein this prohibition of the Constitution has been invoked, are fruitful in definitions of *ex post facto* law and the application of the prohibition to the facts in the various cases.

Blackstone defines the meaning of *ex post facto* law, Vol. 1, page 46: "When, after an action indifferent in itself is committed, the Legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it." This definition has been much enlarged upon by modern decisions.

Mr. Justice Chase, in the leading case of *Calder vs. Bull*, 3 *Dall.*, 386, specifies the following laws as within the prohibition: Every law that makes an action done before the passing of the law and which was innocent when done criminal and punishes such action; every law that aggravates a crime or makes it greater than when it was committed; every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender. In *Hopt vs. Utah*, 110 U. S., 574, *Mr. Justice Har-*

law laid down the following definition: "Statutes which "simply enlarge the class of persons who may be competent "to testify in criminal cases are not *ex post facto* in their "application to prosecutions for crimes committed prior to "their passage, for they do not attach criminality to any act "previously done and which was innocent when done, nor "aggravate any crime theretofore committed, or provide a "greater punishment therefor than was prescribed at the time "of the commission, nor do they alter the degree or lessen "the amount or measure of the proof which was made neces "sary to conviction when the crime was committed. The "crime for which the present defendant was indicted, the "punishment prescribed therefor, and the quality or the degree "of proof necessary to establish his guilt all remained unaf- "fected by the subsequent statute, * * * but alterations "which do not increase the punishment nor change the "ingredients of the offense or the ultimate facts necessary to "establish guilt, but leave untouched the nature of the crime "and the amount or degree of proof essential to conviction, "only removes existing restrictions upon the competency of "certain classes of persons as witnesses, relate to modes of "procedure only, in which no one can be said to have a "vested right, and which the State, upon the grounds of "public policy, may regulate at pleasure. Such regulations "of the mode in which the facts constituting guilt may be "placed before the jury, can be made applicable to prosecu- "tions or trials thereafter had without reference to the date "of the commission of the offense charged."

The essential of all rules, in order that a law be within the prohibition, seems to be that it must alter the situation of the party to his disadvantage. *Judge Cooley*, in his *Constitutional Limitations, Sixth Edition, page 326*, expresses himself as follows: "So far as the mere modes of procedure "are concerned, a party has no more right in a criminal than "in a civil action to insist that his case shall be disposed of "under the law in force when the act to be investigated is "charged to have taken place. Remedies must always be "under the control of the Legislature, and it would create "endless confusion in legal proceedings if every case was to "be conducted only in accordance with the rules and practice, "and heard only by the courts in existence when its facts "arose. The Legislature may abolish courts and create "new ones, and it may prescribe altogether different modes "of procedure in its discretion, though it cannot lawfully, we "think, in so doing, dispense with any of those substantial "protections with which the existing law surrounds the per-"son accused of crime. Statutes giving the government "additional challenges, and others which authorized the "amendment of indictments, have been sustained and applied "to past transactions, as doubtless would be any similar stat-"ute calculated merely to improve the remedy, and in its "operation working no injustice to the defendant and depriv-"ing him of no substantial right."

Defendant quotes and relies in his brief upon certain language of *Mr. Justice Miller* in *Kring vs. Missouri*, 107

U. S., *221*, to sustain him in his contention; but it must be remembered that the question involved in the Kring case was quite different from the question here. By the law in force at the time Kring committed the murder, he could not have been punished with death after a conviction of murder in the second degree. This was afterwards changed by the Constitution of Missouri, and the result of the decision of the Missouri Court deprived Kring of the benefit of that judgment of conviction as evidence to establish his right to be thereafter free from a conviction for murder in the first degree, and it would seem that the argument relied on in that opinion was *dictum*, for the issue did not involve the change of law in regard to bail, to indictments, to grand juries or to trial juries, but it only involved the fact that Kring was deprived of the benefit of certain evidence which would result in absolute immunity from a conviction of murder in the first degree. The plaintiff in error fails, and he may search in vain to bring his case within any of the definitions, *supra*. It is not questioned but what the defendant should be tried by the law in force when his crime was committed. It is a principle founded on natural justice and guaranteed by the Constitution, but in enforcing this guaranty it should not interfere with the ends of justice or prevent the Legislature from enacting laws governing questions of procedure, which the people, through their law makers, see fit to enact. The law complained of in this case makes no new offense. It gives no new definition to the crime, it does not increase the

punishment, nor is the defendant's position changed for the worse. To the numerous cases decided by this Court, and the State courts, upon this prohibition of the Constitution, we desire to call the Court's attention: In some of them the application of the prohibition was refused under circumstances where it would seem that the change was far more to the disadvantage of the defendant than the change in question. In *ex parte McCardle*, 7 *Wall.*, 506, in a case affecting personal liberty, the right of Congress to deprive the complaining party of his benefit of an appeal after the appeal had taken effect and while pending, was held not within the prohibition. Also a State law changing the place of trial to another county from that in which the offense was committed or the indictment found is not *ex post facto*. *Gut vs. Minn.*, 76 *U. S.*, 35, a statute enlarging the class of persons competent to testify is not *ex post facto*. *Hopt vs. Utah*, 100 *U. S.*, 574, the law changing the procedure and manner of enforcing punishment; *Marian vs. State*, 20 *Neb.*, 233. A change in the mode of trial without altering the punishment; *Anderson vs. O'Donell*, 29 *So. Carolina*, 355. A statute transferring jurisdiction from one court to another; *State vs. Cooler* (*So. Car.*), 8 *S. E.*, 692, *and Mathis vs. State* (*Florida*), 12 *So. Rep.*, 681. A law reducing the number of peremptory challenges in felony cases; *South vs. State*, 86 *Ala.*, 617. Constitutional amendment changing the Supreme Court and the number of judges after the commission of an offense; *Duncan vs. Mo.*, 152 *U. S.*, 378. Changing the place of trial; *Cook*

vs. U. S., 138 U. S., 157. (*See Moore vs. Mo., 159 U. S., 675.*)

In the case of *Marian vs. State, 20 Neb., 233*, the law at the time of the commission of the offense provided that the jury should be the judges of the law. This law was repealed before trial, making the judge, instead of the jury, judge of the law in the case. It was held that such legislation was not *ex post facto*. (*See Marian vs. State, 16 Neb., 349.*)

The only analogous case called to our attention by plaintiff in error is *McCarthy vs. State, 25 Pac. Rep., 299*, but upon petition for a re-hearing in that case, *Dunbar, Justice*, says: "The petition for re-hearing in this case is not "allowed, but the Court desires to say that in view of the "public importance of some of the questions raised, and in "view of the fact that the case was submitted without oral "argument on the part of the State, in cases arising hereafter "*it will not be bound by the opinion rendered in this case and* "*the constitutional question involved.*" Afterwards, in the same court, in the case of *Lyberger vs. State of Washington, 27 Pac., 449*, the question involved was whether a prosecution could be had by information when at the time the offense was committed prosecution must have been had by indictment, and the Supreme Court of Washington held that the provisions of their laws were not *ex post facto* as to offenses committed prior to their adoption. This case effectually overrules the *McCarthy* case, *supra*. The same question was considered in *re Wright* (*Wyo.*), *27 Pac. Rep., 565*, and the same conclusion was reached. In *State vs. Ah Jim* (*Mont.*),

23 Pac. Rep., 76, a provision of the Constitution of the State of Montana, reducing the number of grand jurors to seven, of whom five must concur to find an indictment, was sustained as not within the prohibition in respect to an offense committed before the Constitution was adopted.

To refer again to the expressions in the opinion in the Kring case, which plaintiff in error seeks to establish as a rule, we would call the Court's attention to the more recent case of *ex parte Medley, 134 U. S., 160*, where the definition of *ex post facto* legislation is re-stated by *Mr. Justice Miller* in accordance with the rule laid down in *Calder vs. Bull* and the earlier cases, but without reference or affirmation of the expressions relied on as a rule by plaintiff in error.

Gibson vs. Mississippi, 162 U. S., 587;
Watston vs. Com., 16 B. Mon., 15;
Fletcher vs. Peck, 6 Cranch, 138;
State vs. Taylor, (Mo.), 35 S. W., 92;
People vs. McDonald, (Wyo.), 42 Pac., 15.

It will thus be observed from the foregoing cases and rules that a change in the law in order to be held *ex post facto* must alter the situation of the party to his disadvantage in relation to the *offense and its consequence*. The right of trial by a common law jury was not more sacred than the right of presentment by a grand jury, nor in criminal cases more than in civil cases. All the power of the State administering the common law could not place a man upon trial without presentment by a grand jury. It was such an essential and

necessary step, that no matter how certain the evidence of guilt might be, an accused person, at common law, always had between him and his trial and conviction, the right to presentment by a grand jury, who might ignore the charge in the face of overwhelming evidence of guilt. Yet, if the presentment by a grand jury might be done away with, as held by this Court in *Hurtado vs. Cal., 110 U. S., 517*, upon what theory can it be said that the reduction of the number of trial jurors has deprived this defendant and plaintiff in error of a greater or more sacred right? Plaintiff in error's position here it seems is based upon the pure assumption, and, in order to avail him it must amount to a legal presumption, that the four additional jurors which he demands, would as a matter of law, convince the eight of his innocence and resulted in his acquital or arrive at a different result. All the substantial requirements and protections of a trial by jury have been observed, and counsel's contention is speculative that additional jurors would have been of benefit and of advantage to the plaintiff in error.

The first case sustaining the Constitution of Utah, in which this question is raised, is *State vs. Bates, 14 Utah, at page 302, 47 Pac. Rep., 78.*

Counsel for plaintiff in error refers the Court to *American Pub. Co. vs. Fisher, 166 U. S., 463.* It will be noticed that the questions determined by that decision are widely different from the question raised in this case and are readily distinguishable. The Publishing Company case was a civil

action, and was tried in the courts of Utah while it was yet a Territory, and the reasoning of the decision is founded upon the Seventh Amendment to the Constitution of the United States which, it must be conceded, is not applicable to the States, but was applicable to the Territory. It is further founded upon *18 Statute at Large, Ch. 27, page 80.* This law was applicable to the various Territories and affirmed the laws of the same, so far as they authorized a uniform course of procedure in all cases, and contained the following. "Provided that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

The defendant in error respectfully submits that the judgment of the Supreme Court of Utah should be sustained and affirmed.

A. C. BISHOP,
Attorney General,
BENNER X. SMITH, For Defendant in Error.
Deputy Attorney General.

OPINION

THE case is stated in the opinion.

Mr. J. W. N. Whitecotton for plaintiff in error.

Mr. L. T. Michener for defendant in error. *Mr. A. C. Bishop*, *Mr. Benner X. Smith* and *Mr. W. W. Dudley* were on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an indictment returned in the District Court of the Second Judicial District of the Territory of Utah, at its May term, 1895 — that being a court of general jurisdiction — the plaintiff in error and one Jack Moore were charged with the crime of grand larceny alleged to have been committed March 2, 1895, in Wayne County of that Territory, by unlawfully and feloniously stealing, taking and driving away one calf, the property of Heber Wilson.

The case was first tried when Utah was a Territory, and by a jury composed of twelve persons. Both of the defendants were found guilty as charged, and were recommended to the mercy of the court. A new trial having been granted, the case was removed for trial to another county. But it was not again tried until after the admission of Utah into the Union as a State.

At the second trial the defendant was found guilty. He moved for a new trial upon the ground among others that the jury that tried him was composed of only eight jurors; whereas by the law in force at the time of the commission of the alleged offence a lawful jury in his case could not be composed of less than twelve jurors. The application for a new trial having been overruled, and the accused having been called for sentence, he renewed his objection to the composition of the jury, and moved by counsel that the verdict be set aside and another trial ordered.

This objection was overruled, the accused duly excepting to the action of the court. He was then sentenced to the state prison for the term of three years. The judgment of conviction was affirmed by the Supreme Court of Utah, the court

holding that the trial of the accused by a jury composed of eight persons was consistent with the Constitution of the United States.

By the statutes of the Territory of Utah in force at the time of the commission of the alleged offence it was provided that a trial jury in a District Court should consist of twelve, and in a justice's court of six, persons, unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number; that a felony was a crime punishable with death or by imprisonment in the penitentiary, every other crime being a misdemeanor; that the stealing of a calf was grand larceny and punishable by confinement in the penitentiary for not less than one nor more than ten years; that no person should be convicted of a public offence unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer, or upon the judgment of a court, a jury having been waived in a criminal action not amounting to a felony; and that issues of fact should be tried by jury, unless a trial in that mode was waived in criminal cases not amounting to a felony by the consent of both parties expressed in open court and entered in its minutes. 2 Compiled Laws, Utah, 1888, §§ 3065, 4380, 4643, 4644, 4790, 4997.

By the constitution of the State of Utah it is provided: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous." Art. I, Sec. 10. Also: "All criminal prosecutions and penal actions which may have arisen or which may arise before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the State, and in the court having jurisdiction thereof. All offences committed against the laws of the Territory of Utah, before the change from a territorial to a state government, and which shall not have been prosecuted before such change, may be prosecuted in the name and by the authority of the State

of Utah, with like effect, as though such change had not taken place, and all penalties incurred shall remain the same, as if this constitution had not been adopted." Art. XXIV, Sec. 6.

As the offence of which the plaintiff in error was convicted was a felony, and as by the law in force when the crime was committed he could not have been tried by a jury of a less number than twelve jurors, the question is presented whether the provision in the constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed within the limits of the State while it was a Territory, without bringing that provision into conflict with the clause of the Constitution of the United States prohibiting the passage by any State of an *ex post facto* law.

The Constitution of the United States provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed, but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." Art. III, Sec. 2. And by the Sixth Amendment of the Constitution it is declared: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question. *Webster* v. *Reid*, 11 How. 437, 460; *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 468; *Springville* v. *Thomas*, 166 U. S. 707. In the last named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the Territory of September 9, 1850, 9 Stat. 453, c. 51, § 6, to provide that una-

nimity of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

It is equally beyond question that the provisions of the National Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the Territories of the United States.

The judgment of this court in *Reynolds* v. *United States*, 98 U. S. 145, 154, which was a criminal prosecution in the Territory of Utah, assumed that the Sixth Amendment applied to criminal prosecutions in that territory.

In *Callan* v. *Wilson*, 127 U. S. 540, 549, 551, which was a criminal prosecution by information in the Police Court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the Third Article of the Constitution as well as by the Fifth and Sixth Amendments. The contention of the Government was that the Constitution did not secure the right of trial by jury to the people of the District of Columbia; that the original provision, that when a crime was not committed within any State "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offences committed on the high seas; that, in adopting the Sixth Amendment, the people of the States were solicitous about trial by jury in the States and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be thereafter ceded for the purposes respectively of a seat of Government, forts, magazines, arsenals and dockyards; and, consequently, that that Amendment should be deemed to have superseded so much of the Third Article of the Constitution as related to the trial of crimes by jury. That contention was overruled, this court saying: "As the guarantee of a trial by jury, in the Third Article, implied

a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property — especially of the privilege of trial by jury in criminal cases." "We cannot think," the court further said, "that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States."

In *Mormon Church* v. *United States*, 136 U. S. 1, 44, one of the questions considered was the extent of the authority which the United States might exercise over the Territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court, in one of which, *National Bank* v. *County of Yankton*, 101 U. S. 129, 133, it was said that Congress, in virtue of the sovereignty of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the Territorial legislature valid, and a valid act void; that it had full and complete legislative authority over the people of the territories and all the departments of the territorial governments; that it "may do for the Territories what the people, under the Constitution of the United States, may do for the States." Reference was also made to *Murphy* v. *Ramsey*, 114 U. S. 15, 44, in which it was said: "The people of the United States,

as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." The opinion of the court in *Mormon Church* v. *United States* then proceeded: "Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the Territories and over the acts of the territorial legislatures established therein, is generally expressly reserved in the organic acts establishing governments in said Territories. This is true of the Territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared 'that the legislative powers of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. 454."

Assuming then that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale's P. C. 161; 1 Chitty's Cr. Law, 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., "but by the judgment of his peers or by the law of the land," it referred to a trial by twelve jurors. Those who emigrated to this

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ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 553. Argued March 4, 7, 1898. — Decided April 25, 1898.

The provision in the constitution of the State of Utah, providing for the trial of criminal cases, not capital, in courts of general jurisdiction by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State.

country from England brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." 2 Story's Const. § 1779. In Bacon's Abridgment, Title Juries, it is said: "The trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta." So, in 1 Hale's P. C. 33: "The law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge." It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the Territory of Utah — which was under the complete jurisdiction of the United States for all purposes of government and legislation — the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a Territory.

Was it then competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a Territory, namely, to provide for his trial by a jury of eight persons?

We are of opinion that the State did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a Territory,

that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a State could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the State not only to do what the United States in respect of Thompson's crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offence was committed.

It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and "in its relation to the offence, or its consequences, alters the situation of the accused to his disadvantage." *United States* v. *Hall*, 2 Wash. C. C. 366; *Kring* v. *Missouri*, 107 U. S. 221, 228; *Medley, Petitioner*, 134 U. S. 160, 171. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed. And, therefore, it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him. Cooley in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to *ex post facto* laws, says: "But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in ex-

istence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." c. 9, 6th ed. p. 326. And this view was substantially approved by this court in *Kring* v. *Missouri*, above cited. So, in *Hopt* v. *Utah*, 110 U. S. 574, 590, it was said that no one had a vested right in mere modes of procedure, and that it was for the State, upon grounds of public policy, to regulate procedure at its pleasure. This court, in *Duncan* v. *Missouri*, 152 U. S. 377, 382, said that statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in *Hopt* v. *Utah*, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offence charged against him.

Now, Thompson's crime, when committed, was punishable by the Territory of Utah proceeding in all its legislation under the sanction of and in subordination to the authority of the United States. The court below substituted, as a basis of judgment and sentence to imprisonment in the penitentiary, the unanimous verdict of eight jurors in place of a unanimous verdict of twelve. It cannot therefore be said that the constitution of Utah, when applied to *Thompson's case*, did not deprive him of a substantial right involved in his liberty, and

did not materially alter the situation to his disadvantage. If, in respect to felonies committed in Utah while it was a Territory, it was competent for the State to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge.

The Supreme Court of Utah held that this case came within the principles announced by it in *State* v. *Bates*, 14 Utah, 293, 301. In the latter case no reference was made to the *ex post facto* clause of the Constitution of the United States. But it was held that the requirement of eight jurors in courts of general jurisdiction, except in capital cases, was not in conflict with the Sixth Amendment of the Constitution of the United States — the court saying that "if a jury of eight men is as likely to ascertain the truth as twelve, that number secures the end," and that "there can be no magic in the number twelve, though hallowed by time." But the wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors. It was not for the State, in respect of a crime committed within its limits while it was a Territory, to dispense with that guarantee simply because its people had reached the conclusion that the truth could be as well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case.

It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons. In the case of *Hopt* v. *Utah*, above cited, the question arose whether

the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to their trial of the several challenges in his absence. The court said: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority. 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be

deprived of his liberty by a tribunal not authorized by law to determine his guilt.

In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offence, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.